IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 419

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

E. C. ATKINS AND COMPANY,
Respondent.

PETITION FOR REHEARING OF RESPONDENT, E. C. ATKINS AND COMPANY.

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PETITION FOR REHEARING OF RESPONDENT, E. C. ATKINS AND COMPANY.

The Respondent, E. C. Atkins and Company, respectfully prays that this Court grant a rehearing in this case.

Opinions Below.

1. The first opinion of the Circuit Court of Appeals for the Seventh Circuit denying application of the Board for enforcement of its Order on February 27, 1945 is reported in 147 F. 2(d) 730 (R. 348-366).

2. The Order of this Court granting writs of certiorari vacating the first judgment entered by the Circuit Court of Appeals and remanding the case for further consideration is reported in 325 U. S. 838.

3. The second opinion of the Circuit Court of Appeals

for the Seventh Circuit denying application of the Board for enforcement of its Order on May 31, 1946, is reported in 155 F. 2(d) 567 (R. 320-321).

4. The Decision of the Board in the representation proceeding which forms a part of the Record in this case is reported in 52 NLRB 1470 (R. 5-8). The Decision and Order of the Board in this case is reported in 56 NLRB 1056 (R. 30-42).

Action of This Court.

Having granted the Board's Petition for a Writ of Certiorari on December 23, 1946, and having received briefs and oral argument, this Court on May 19, 1947 reversed the judgment of the Circuit Court of Appeals for the Seventh Circuit which had denied enforcement to the Board's Order. The opinion of this Court is set forth in full in Appendix B, *Infra*, pp. 41-57.

Jurisdiction.

This Petition for Rehearing is filed pursuant to Rule 33 of the Rules of this Court within twenty-five days after May 19, 1947, the date upon which judgment was entered, or on or before June 13, 1947; and is supported, as such Rule requires, by a certificate of counsel to the effect that it is presented in good faith and not for delay.

Grounds for Petition for Rehearing.

1. This Court erred in taking judicial notice of Circular No. 15 issued on March 17, 1943 by Headquarters, Army Service Forces (Board's Brief, Appendix B) since that Circular No. 15 was not issued by the Secretary of War in whom the power to issue regulations was vested by Executive Order No. 8972.

2. This Court erred in considering Circular No. 15 issued on March 17, 1943 by Headquarters, Army Service Forces (Board's Brief, Appendix B) in support of the Board's Order because that Circular No. 15 was not in evidence, was not considered by the Board, and was not known to the Board at the time its Order was entered.

3. This Court erred in holding, contrary to the Record, that the relationship between Respondent and the guards was covered by Circular No. 15 issued on March 17, 1943 by Headquarters, Army Service Forces (Board's Brief, Appendix B).

4. The conclusion of this Court that the guards were employees because wages, hours and promotion remain matters to be determined by Respondent is not supported by the evidence.

5. The conclusion of this Court that Respondent delegated to the Chief Guards power to determine the guards' working hours and the promotion policies in regard to them is not supported by the evidence.

6. This Court erred in holding, contrary to the evidence, that the Chief Guards represented Respondent when, in fact, they represented the Army.

Statute Involved.

The pertinent provisions of Sections 7, 8, 9 and 10 of the National Labor Relations Act (Act of July 5, 1935, Ch. 372, 49 Stat. 449, 29 USC, Sec. 151, *et seq.*) are set forth in Appendix A. *Infra*, pp. 35-41.

ARGUMENT.

I.

This Court Erred in Considering Circular No. 15.

1. This Court's Decision Is Founded Upon Circular No. 15.

The opinion of this Court tests the status of the plant guards at Respondent's plants almost wholly by a detailed summary of Circular No. 15, issued on March 17, 1943 by Headquarters, Army Service Forces. This is supplemented by a brief review of the evidence contained in the Record, but only as corroborative of the conclusions reached from Circular No. 15. Thus the review of the actual evidence begins:

> "The evidence and testimony submitted to the Board confirmed the fact that the plant guards in respondent's two plants were militarized in accordance with the foregoing regulations."[1]

Thus the opinion rests almost wholly upon Circular No. 15. Since, as will be demonstrated in this Part of this Petition, Circular No. 15 was not available for consideration by this Court, rehearing should be ordered.

2. The Status of Circular No. 15 in This Case.

Circular No. 15 never became part of the Record in this case. It was not presented or mentioned in either the representation or unfair labor practice hearing before the Board. The Board itself did not refer to it in its Decision and Direction of Election (R. 5-8); in its Certification of Representatives (R. 17); in its Intermediate Report (R. 33-42); or in its Decision and Order (R. 30-33). No-

1. It is incredible that militarization, beginning on July 30, 1942 (Stip. p. 2), took place in accordance with Circular No. 15 issued March 17, 1943 (Board's Brief, Appendix B, pp. 134-160).

where is there any evidence that Circular No. 15 was known to Respondent, or to the plant guards, or to the Union. Much less is there any basis for finding that it governed the relations between Respondent and the plant guards.

Circular No. 15 first appeared as an "Addendum" to the Brief filed by the Board September 18, 1944 in the Circuit Court of Appeals for the Seventh Circuit. (Board's Brief, pp. 20-44). Respondent promptly filed with that Court a motion to require the Board to conform its brief to the rules of that Court by striking therefrom Circular No. 15. The Circuit Court of Appeals overruled that motion, and in its opinion took judicial notice of the document (R. 353). That error was asserted by Respondent in its brief before this Court.

3. This Court Erred in Taking Judicial Notice of Circular No. 15.

In a footnote to its opinion, this Court says:

> "Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483-484."

It is submitted that under the prior decisions of this Court it cannot take judicial notice of such a document; and that *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 483-484, is not a precedent for the proposition that it can.

First, it is necessary to consider the nature of Circular No. 15. It is issued by "W. D. Styer, Major General, General Staff Corps, Chief of Staff" (Board's Brief, Appendix B, p. 157). It purports to be issued "By command of Lieutenant General Somervell." (Board's Brief, Appendix B, p. 157). Circular No. 15 does not purport to be issued by, or at the direction of, the Secretary of War.

Neither General Styer nor General Somervell, was a person authorized or directed by Congress or by Executive Order to issue regulations on this subject.

The applicable Executive Order is No. 8972, dated December 12, 1941, which is set forth verbatim in a Reply Memorandum filed by Respondent in the Circuit Court of Appeals (R. 344-345). That order gives authority only to the Secretary of War.

The Secretary of War, on July 2, 1942, issued a letter to various officers directing that guard forces be organized. This letter (Board's Brief, Appendix B, pp. 157-159) was signed by Major General J. A. Ulio, the Adjutant General, but it was done "By order of the Secretary of War."

It thus appears that only the Secretary of War was authorized and directed by Executive Order to establish guard forces; and that Circular No. 15 was not issued by him or at his direction.

This Court's opinion in *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 483-484, does *not* decide that this Court can take judicial notice of such a document. First, there was no judicial notice question in that case. The regulations there involved were set forth verbatim in the complaint and were expressly admitted in the answer.[2] Thus

2. *Library of the Supreme Court of the United States, Transcripts of Records and File Copies of Briefs (1941)*, Vol. 159, Case No. 1125, *Standard Oil Co.* v. *Johnson*, Transcript of Record, Complaint, page 4:

"VI.

Attached hereto and marked Exhibit A is a true copy of Army Regulations No. 210-65 issued by the War Department on June 29, 1929, together with copies of amending and supplementary regulations thereto marked Exhibits B to H, inclusive, as they appear in Army Regulation 210-65, C-3 and War Department Circulars issued by the War Department from time to time, subsequent to June 29, 1929, as indicated thereon. Said Exhibits A to H, inclusive, are hereby incorporated herein as fully as though set forth at length herein. The post exchanges referred to in paragraph IV hereof were organized

they were properly before the Court as admitted facts, and there was no problem of judicial notice presented.

Further, this Court's opinion in *Standard Oil Company* v. *Johnson*, 316 U. S. 481, nowhere mentions judicial notice.

Finally, the regulations involved in *Standard Oil Company* v. *Johnson*, 316 U. S. 481, were of a different nature than Circular No. 15. As appears from the Transcript of Record in that case (*Library of the Supreme Court of the United States, Transcripts of Records and File Copies of Briefs* (1941), Vol. 159, Case No. 1125, pp. 7-71), those regulations were signed "By order of the Secretary of War." As appears from this Court's opinion in that case, the Secretary of War was authorized to issue such regulations by Acts of Congress.

Circular No. 15 was not a regulation issued by the Secretary of War pursuant to an Act of Congress or an Executive Order. Rather, it was an order issued by a high ranking army officer. It is assumed that it was a lawful order which his subordinates were required to obey. But it is not one which regulated and controlled the relationship between Respondent and the plant guards, who never heard of it. And it is not a proper subject of judicial notice.

The decision of this Court in *Burke* v. *Tregre*, 86 U. S. (19 Wall.) 519, is exactly in point. The Court there was asked to take judicial notice of an order by General Banks, military commander of Louisiana, issued in the exercise of the authority conferred upon him. There, as here, the

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and owned and have since operated entirely in accordance with and under and by virtue of said Army Regulations."

The Exhibits A to H, inclusive, appear on pages 7-71 of the Transcript of Record.

The foregoing allegations were admitted in Paragraph I of the Answer (Transcript of Record, p. 72):

"I.

Admits the allegations contained in paragraphs I, II, III, IV, V and VI of said complaint."

order did not appear in the record, and it did not appear that it had been brought to the attention of the persons affected. There, as here, counsel had simply set it forth at length in a brief. This Court held that it could not take judicial notice of such an order:

> "It is contended by the plaintiff in error that an order of General Banks, in military command at New Orleans, during the period of this controversy, which is set out at length in the brief of counsel, operated as an injunction upon the proceedings of the Marshal, and that, therefore, the sale of the plantation was unauthorized. The answer to this position is that, in the state of the pleadings and evidence, we are not at liberty to pass upon the legality of this order or to determine what effect should be given to it if properly issued. It is not in the record at all, and for aught that appears, was never brought to the notice of either of the courts in Louisiana engaged in the decision of the case.
>
> "It may be that the courts of the country would take judicial notice that Louisiana, at the time mentioned, was in the military occupation of our forces, under General Banks, but we know of no rule of law or practice requiring this, or any other court, to take notice of the various orders issued by a military commander in the exercise of the authority conferred upon him." (86 U. S. 519.)

This Court has made plain in its decisions the limits within which regulations will be judicially noticed. Those limits include only those regulations issued by the officer or agency authorized and directed to issue them by Act of Congress or by Executive Order. The leading case, constantly cited in the decisions, and cited by the Board before the Circuit Court of Appeals, is *Caha* v. *United States*, 152 U. S. 211, 221-222. There this Court said:

> "Another matter is this: The rules and regulations prescribed by the Interior Department in respect to

contests before the Land Office were not formally offered in evidence, and it is claimed that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, *by the express language of any Act of Congress*, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public in interested, and in respect to which they have a right to participate, and by which they are to be controlled, *the rules and regulations prescribed in pursuance of such authority* become a mass of that body of public records of which the courts take judicial notice." (152 U. S. 211, at 221-222. Emphasis supplied.)

No case will be found in which this Court has judicially noticed orders, rules or regulations issued by someone, not the head of a department, to whom such authority has not been entrusted by statute or Executive Order.

This is a matter of great public importance. The multitude of government agencies and their hordes of officials of all grades and classes put out rules and regulations in a constant flood. Most of them are given no publicity whatever. It is impossible for the citizens to whom they purport to refer even to learn of their existence.

If all these orders are to bind the citizens without being communicated to them; if the citizens are to be assumed to have acted with reference to them without knowing of their existence; if they are to be received by Courts without proof of their issuance or that they were ever applied to the parties litigant; if they are to be noticed at the appellate level to support findings otherwise unsupported

at the trial level where they were unknown;—in such circumstances all vestige of certainty in dealings between citizens and with the Government will be destroyed, and the fundamental rules of administrative procedure will be overthrown.

Congress recognized this serious problem and attempted its solution in the Federal Register Act (49 Stat. 501, 44 USC 305). That Act requires publication of "such documents or classes of documents as the President may determine from time to time have general applicability and legal effect." Documents so published in the Federal Register are entitled to judicial notice. Circular No. 15 was not, and was not required to be, published in the Federal Register.

This Court has not merely taken judicial notice of Circular No. 15. It has also held that Respondent and the plant guards acted in accordance with, and were bound by, that document, without any showing that they had ever heard of it.

It is submitted that this Court erred in taking judicial notice of Circular No. 15 and that it should grant rehearing of the case based upon the transcript of the record.

4. It Would Destroy the Administrative Process to Permit Consideration by an Appellate Court of Matters Not Presented to the Administrative Tribunal.

The essence of the administrative process is that the administrative tribunal hears the evidence, finds the facts, applies the law, and issues an order. That those findings are conclusive if supported by evidence, and the order is final if the tribunal has followed a procedure which is according to law and not arbitrary. The appellate function is limited to a trial of the trial before the Board—if the Board's processes in arriving at the order were according to law, then the order itself is lawful.

This purpose of making the hearing before the Board complete and final is embodied in the Act. It is provided that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive" (Act, Sec. 10(e), *Infra*, pp. 38-39). Thus the Court cannot substitute its judgment in weighing the evidence for that of the Board. It is provided that: "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." (Act. Sec. 10(e), *Infra*, pp. 38-39). Thus the Board's proceedings are made conclusive as to the issues, and respondents are forbidden to attempt to destroy their finality by saving issues for initial presentation to the court. The Circuit Court of Appeals is limited to entering a decree "upon the pleadings, testimony and proceedings set forth" in the transcript certified by the Board.

Thus the purpose of judicial review in the Act is simply to provide "a complete guarantee against arbitrary action by the Board."[3]

The very basis of this administrative process is destroyed if the reviewing court can consider, under the guise of judicial notice, evidence which was not before the Board by judicial notice or otherwise. No longer will the administrative process be complete and final, with judicial review limited to the detection of arbitrary action. Cases can thereafter be decided by the Courts upon evidence judicially noticed which was unknown to the Board. Thereby issues of law and fact never considered by the Board can determine the enforcement or setting aside of the Board's order.

In this particular case the evidence, not considered by the Board, was brought to the notice of the Circuit Court

3. S. Rep. No. 573, 74th Cong. 1st Sess. p. 14. *May Department Stores Co.* v. *National Labor Relations Board*, 326 U. S. 376.

of Appeals by the Board itself. But in other cases it could be the respondent which thus shifts the evidence and issues in the Court after the administrative process is finished.

It is submitted that the judicial notice of the reviewing court should be limited to those things noticed by the Board and brought to the attention of respondent when it has an opportunity to rebut them. If matters of importance are discovered after the case reaches the reviewing court, the Act contains ample provisions for the taking of additional evidence before the Board which can then make additional findings and modify its order. Such limitations are necessary to protect the administrative process from abuse and destruction.

5. Circular No. 15 Was Erroneously Used by This Court to Show That the Board's Determination Had a Reasonable Basis in the Evidence Although It Was Not Part of the Evidence.

This Court stated the function of the reviewing courts as follows, in its opinion in this case:

> "As to the merits, it is elementary that the Board has the duty of determining in the first instance who is an employee for purposes of the National Labor Relations Act and that the Board's determination must be accepted by reviewing courts *if it has a reasonable basis in the evidence* and is not inconsistent with the law." (Emphasis supplied.)

Yet when this court came to examine the "evidence" for a "reasonable basis" for the Board's determination that the guards were employees, it devoted most of its examination to Circular No. 15. Circular No. 15 was not known to the Board at the time it made its findings and issued its order. Its determination could not have been based upon Circular No. 15.

Surely the minimum requirement of administrative due process is that the Board's finding and order be based upon evidence known to the board when its determination is made.

II.

Basis of the Judgment of This Court.

In its opinion this Court stated that whether militarized plant guards are *employees for the purposes* of the Act depends upon whether, under the particular circumstances, the militarization transferred to the Army all of the matters which would form the basis for collective bargaining as contemplated by the Act.

This Court said that militarized guards would be employees for the purposes of the Act if

(a) "*the employer may retain power to fix wages, hours and other conditions of work;*" (Emphasis supplied.)

(b) "the need and desirability for collective action on the part of the guards may exist as to matters over which the employer retains control;"

(c) "and a recognition of the statutory rights of the guards may be entirely consistent with their military obligations."

On the other hand this Court said:

"*But if the militarization is such as to transfer to the Army all the matters* over which the employer would normally have control, matters *which would form the basis for collective bargaining as contemplated by the Act, the guards may lose their status as private employees* within the purview of the statute." (Emphasis supplied.)

This Court then reviewed the evidence and found:

"The most important incidents of the employer-employees relationship—*wages, hours and promotion—re-*

mained matters to be determined by respondent rather than by the Army. Respondent could settle those vital matters unilaterally or by agreement with the guards. And the guards were free to negotiate and bargain individually or collectively on these items." (Emphasis supplied.)

This is the heart of the opinion. The judgment of this Court turns upon whether wages, hours and promotion were matters to be determined by Respondent. If, upon the Record, they were not, then this Court's judgment is erroneous.

It is submitted that the evidence shows that hours and promotion were not matters to be determined by Respondent but rather that the power to determine them was in the Army and that their determination was made by the Chief Guard acting as a representative of the Army and not as a representative of Respondent; and that wages were paid by Respondent under circumstances rendering them irrelevant to the "employee" status.

III.

The Determination of Hours and Promotion.

1.—The Board Made No Finding Respecting Hours and Promotion.

In determining from the evidence whether Respondent had power to promote the guards or fix their hours this Court is not hampered by that provision in Section 10(e) of the Act that "the findings of the Board as to the facts, if supported by evidence, shall be conclusive." For the Board did not make any finding about either the power to fix the guards' hours or the power to promote them.

The Board in its Decision makes the following general statement:

> "It is clear, however, that the respondent still retains a sufficient residual measure of control over

the terms and conditions of employment of the guards so that the guards should not be deprived of the rights guaranteed in the Act." (R. 32).

This implies that, even as the Board looked at the evidence, there were some terms and conditions of employment not included within the residue of control by Respondent. This is made apparent from the Board's preceding sentence:

> "It is true that for reasons of national security the respondent may have surrendered to the military authorities many of the attributes of control which it would normally possess over its plant guards." (R. 32).

The Board's specific findings of fact on the locus of control over the terms and conditions of employment are as follows:

> "The record shows that the guards are interviewed for employment by the respondent and not by the United States of America, and are hired by the respondent; that their discharge is ordinarily initiated by the respondent; and that during their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America. According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works 'very closely' and 'cooperates' with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty. Cyrus E. Wood, the respondent's personnel director, who corroborated Johnston's testimony as related above, referred to the guards at the plants involved as the respondent's employees, and further testified that the respondent makes the 'necessary pay roll deductions' before paying them their wages." (R. 31.)

There is no reference to promotion in these findings. This Court thus approaches the question of control over promotions and hours of work unhampered by the statutory premium placed upon administrative findings.

2. This Court's Review of Evidence on Promotion and Hours of Work.

The opinion of this Court in reviewing the evidence refers to working hours and promotion policies only in the following sentence:

> "Respondent delegated to the chief guards its power to determine the guards' working hours and the promotion policies in regard to them."

3. The Evidence Respecting Promotions and Working Hours.

The power to promote is mentioned at only one point in the Record of this case. This was in the cross-examination of Chief of Guards Johnston by Trial Examiner Shroyer. The complete testimony is as follows:

> "Q. These four lieutenants—who made them lieutenants?
>
> A. I made three of them myself. One of them was a lieutenant when I came there. He is a very fine man. His work had been satisfactory and I saw no reason to change it.
>
> Q. Whom did you confer with?
>
> A. No one.
>
> Q. You have final authority to do that?
>
> A. Yes, sir.
>
> Q. Without going either through the personnel office or through the Auxiliary Military Police departments?
>
> A. The only thing I did was after I had decided who would be the next lieutenant and furthered that man, made him a lieutenant, myself, in my office, gave him his gold badge and his authority and posted the notice that he was a lieutenant, and then I went to Personnel and advised them that he was the new lieutenant.

Q. He got his increase in pay?
A. Yes." (R. 82.)

The power to fix the guards' working hours is mentioned at only two points in the Record of this case. These are both in the testimony of Chief of Guards Johnston and are as follows:

"Q. State whether or not the shifts of your guard at your plant rotate or whether they are always the same?

A. The shifts rotate every two weeks.

Q. What do you mean by rotate?

A. I mean that there is entirely—it is my idea, but it seemed a fair way to run it for our particular plant, that they all trade hours every so often and give each other an even break on it, so the 8-4 shift will work from eight until four in the day time for two weeks and then on a Sunday morning, starting at 8 o'clock in the morning, that shift of men will by and large gravitate to the 12-8 shift, upon which they will stay for two weeks, and on completion of that two weeks, they will revert back to the 4-12 shift, that is the idea, although we don't always go to the letter on that.

Q. That is your idea, is it?

A. Yes, sir, that is my idea.

Q. State whether or not the shifts of the regular production and maintenance employees at the main plant of the Atkins company rotate?

A. No, sir; they don't rotate at all. They are frozen shifts.

Q. What you are doing is directly the opposite of what Mr. Wood in the Personnel Department does with the remaining production employees?

A. Yes, sir." (R. 78-79.)

* * * * *

"Q. What are your hours of work?

A. My own hours?

Q. Yes.

A. I work whenever I think—I work whatever

hours I think are advisable to work. They are very scattered and go all around the clock.

Q. You are paid overtime after eight hours in one day?

A. No, sir. I work on a straight salary basis. There is no cognizance at all taken of that when there are any extra hours.

Q. Do you on the average work more than eight hours a day?

A. Well—

Q. How much more?

A. Oh, on an average week after week, it might be ten hours—on an average week after week. Sometimes I work as high as sixteen and twenty and twenty-two, depending on the day and time and circumstances.

Q. But that is left to your own initiative as a military officer?

A. Yes, sir.

Q. Subject nevertheless to any orders you may get from higher authority?

A. Yes, sir." (R. 79-80.)

No reference either to the power to promote or to the power to fix hours of work appears in any of the regulations contained in the Record or in Circular No. 15 cited in this Court's opinion.

4. This Court Erred in Finding Promotions and Hours of Work to Be Matters to Be Determined by Respondent.

It thus appears that there was no evidence that either the power to promote or the power to fix hours of work was vested in Respondent. The sole evidence concerning the power to promote was the testimony of Chief of Guards Johnston that he made the only promotions himself, that he had final authority to make them, and that he consulted no one before doing so. There was no evidence that Chief Johnston acquired this power by delegation from Respondent. On the contrary, as will appear in Part V of this

Argument, it is apparent from the Record that Chief Johnston represented the Army, and not Respondent, in performing this, as well as the other of his functions.

Likewise there was no evidence that Respondent had any power to fix working hours. The only evidence was that Chief Johnston did, in fact, fix the working hours of guards and that he fixed them according to a system contrary to that used by Respondent for its production employees. There was no evidence that Chief Johnston acquired this power by delegation from Respondent. As will be seen from Part V of this Argument Chief Johnston in fixing hours, as in all of his other activities, was acting as a representative of and on behalf of the Army and not on behalf of Respondent.

IV.

The Determination of Wages.

1. The Board's Findings Respecting the Determination of Wages.

The Board made the following findings on the subject of wages:

> "The record shows that" * * * during their employment they are paid by the respondent, at rates set by the respondent and not by the United States of America. * * * Cyrus E. Wood, the respondent's personnel director, * * * testified that the respondent makes the 'necessary pay roll deductions' before paying them their wages." (R. 31.)

2. This Court's Review of Evidence on the Determination of Wages.

The opinion of this Court, in reviewing the evidence and Circular No. 15, refers to wages and their determination as follows:

> "According to Circular No. 15: 'Basically, the militarization of plant guard forces does not change the

existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements."

• • • • •

"Respondent at all times carried the guards on its regular pay rolls, determined their rate of compensation and paid their wages after making appropriate deductions. And since it did not operate on a cost-plus basis, respondent actually bore the cost of the guards' wages." [18]

• • • • •

Footnote 18 to Court's Opinion:

"[18] Respondent argues that it was forced to pay the guards because of the War Department's action in requiring additional plant protection. But respondent was not forced to enter into its war production contracts with the Government. It did so voluntarily and with the understanding that it would comply with any terms and conditions the Government saw fit to impose. One of these conditions was that respondent expand its peacetime guard force of six men to a wartime complement of sixty-four. So far as these additional guards being respondent's employees is concerned, it is no different from a requirement that respondent employ more chemists or other production experts to facilitate execution of the contracts."

3. The Evidence Respecting Determination of Wages

The following appears in the testimony of Mr. Wood, Respondent's Personnel Director, upon cross-examination:

"Q. Mr. Wood, when employees on the guard force are hired, who sets the rate of pay?

A. The rate of pay was established when we filed our schedule October 3, 1942, with the Wage and Hour Division.

Q. The company set that rate of pay at that time?

A. That's right." (R. 93.)

Chief Guard Johnston testified upon cross-examination:

"Q. Are you paid by check?

A. Yes, sir.

Q. Who signs the check?

A. E. C. Atkins and Company.

Q. What do you mean you are hired by the Government when E. C. Atkins and Company pays you?

A. *They pay because the Government makes them pay me.*" (R. 82. Emphasis supplied.)

4. The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals in its first opinion said:

"The incident most strongly emphasized is that they were paid by respondent. Undoubtedly, this is the most important incident common to the employer-employe relationship. In the instant case, however, it is, when viewed in connection with the attending circumstances, largely minimized if not entirely obliterated. Payment of these guards by respondent, in fact their employment, was a requirement imposed by the government as a prerequisite to respondent's right to engage in the manufacture of war material. It had no option to pay or not pay; neither did it have any option to employ or not employ. Chief Johnston, when asked why the guards were paid by respondent when their orders were received from the military authorities, stated an incontrovertible fact: 'They pay because the government makes them pay.' It must be assumed, so we think, that respondent was reimbursed by the government for all costs incurred in the manufacture of war material, including that of compensation paid to the guards. In reality, under such circumstances, as bearing upon the employer-employe relationship, we are of the view that it makes no difference whether they were paid by respondent or by the government.

"It is also well to keep in mind that this guard force was born of the exigencies of war. None of them (with the exception of the four original watchmen) had theretofore been employed at respondent's plant. They were employed at the command of the government and the purpose of their employment was, as stated in the

President's proclamation, 'to protect from injury or destruction national-defense material, national-defense premises, and national-defense utilities,' or, as stated in the agreement which the plant guard was required to sign with the government, 'to protect war material, war premises, and war utilities against all enemies, foreign and domestic.' In 'Plant Protection Data Binder' dated June 7, 1943, the mission of a guard force is stated to be twofold: (a) 'to provide interior and exterior protection of the plant against sabotage and espionage and natural hazards,' and (b) 'to serve with the Army in providing the protection to the plant and its environs in emergency situations.' Again, it is stated in this Binder, 'The auxiliary military police are supplementing the Army of the United States in a vital task of protecting war material and war production facilities.' It appears certain not only that they were employed at the command of the government but that the services rendered by them were for the benefit of the government and the war effort. Any benefit accruing to respondent from their services was purely incidental to the primary purpose of their employment. Reliance upon payment under such circumstances is to embrace form and to ignore the realities of the situation." (R. 354-355.)

5. This Court Erred in Holding That Wage Determination Make the Guards Employees Under the Act.

The requirement of the War Department that Respondent co-operate in the establishment at its plants of a force of Auxiliary Military Police is definitely "different from a requirement that respondent employ more chemists or other production experts to facilitate execution of the contracts." (This Court's Opinion, footnote 18.)

If those chemists or other production experts were employed by Respondent at its own selection, under its control, and upon terms and conditions of employment determined by Respondent, they would of course be Respond-

ent's employees. The fact that they were employed to fill a war contract would not be relevant.

But if those chemists were selected by the Army and dismissed by it; if their terms and conditions of employment were set by the Army and not by Respondent; if they were directed by a Chief Chemist who was directed by and answerable to the Army and not to Respondent; if their chief function was the performance of a military purpose such as protecting war plants or material against espionage and sabotage; if the chemists were expressly subjected to court martial for purely military offenses such as desertion and compelling a commander to surrender (Resp. Ex. 4, R. 108; Article 58, R. 138 and Article 76, R. 143); and if the chemists were required to wear distinctive insignia so that they "will be recognized as legitimate troops" (Resp. Ex. 4, R. 110)—in such event it would be relevant to explain payment by Respondent by stating Respondent was forced to pay under the contract.

It is true that

> "respondent was not forced to enter into its war production contracts with the Government. It did so voluntarily and with the understanding that it would comply with any terms and conditions the Government saw fit to impose." (This Court's Opinion, footnote 18.)

But suppose the Army had stationed sixty-four men who were clearly soldiers at Respondent's plant, and required Respondent, as a condition of its contract, to pay them? Would those soldiers become "employees" under the Act? Would Respondent be forbidden to say "we paid because we were forced to pay"?

Of course, it may be answered that it would be illegal to require Respondent to pay soldiers. But that enhances the analogy. The Attorney General of the United States

has given the opinion that the whole system of militarizing plant guards was illegal:

> "An examination of the basic authority pursuant to which the 'Civilian Auxiliary Military Police' was organized, including Executive Order 8972, the various statutes providing for the composition of the armies of the United States, and the Articles of War, *leads me to conclude that there is no legal basis for the militarization of these plant protective forces.*" (Board's Brief, Appendix D, p. 164.) (Emphasis supplied.)

It is submitted that the payment of wages by Respondent does not afford a basis for holding these guards to be employees of Respondent under the Act.

V.

The Chief Guards Represented the Army, Not Respondent.

1. The Importance of This Issue.

It is vital to this case to know whom the Chief Guards represented. When a Chief Guard acted, was it the act of Respondent, or the act of the Army? Did the Chief Guards exercise authority delegated by Respondent, which Respondent could exercise? Or did they exercise authority given to them by the Army which only the Army, and not Respondent, could exercise?

This Court found in its Opinion that the Chief Guards represented Respondent in directing the guards and in setting their hours of work and promotion policies. That finding is essential to this Court's Opinion.

It is submitted that the Chief Guards were not controlled by Respondent in any way; that they were controlled by the Army; that they received no delegation of powers from Respondent; that they did not purport to act for Re-

spondent; and that Respondent did not purport to have, delegate or exercise the powers which were exercised by the Chief Guards.

2. There Was No Finding by the Board That the Chief Guards Represented Respondent.

The only reference to either Chief Guard in the Board's Decision was the following reference to Chief Johnston:

> "According to Chief Guard Henry A. Johnston, a witness called by the respondent in the hearing in the representation case, he is in command of all the guards at one of the plants and works 'very closely' and 'cooperates' with the respondent's representatives. Moreover, Johnston admitted that the respondent could temporarily suspend a guard from duty." (R. 31.)

Therefore this Court is not limited by any finding on the subject, and must look to the Record for the status of the Chief Guards.

3. The Chief Guards Were Enrolled by the Army.

There is no dispute that Chief Johnston was himself a member of the Auxiliary Military Police. He applied for enrollment like anyone else at the Respondent's personnel office, and "was given to understand that then when I filled the application that it would not be effective without the approval of the United States Government." (R. 68) He was investigated by the Military Authorities (R. 71) and not by Respondent, and was sworn in as a Military Policeman (R. 69). The Army then issued to him a "Plant Guard Identification Card" (R. 69) which appears in facsimile as Respondent's Exhibit 3 (R. 104).

He was required to sign an Agreement with the United

States of America (Resp. Ex. 2, R. 103-104), after which he was a representative of the Government in the plant:

> "A. Well, that exhibit there is signed by the guard, the member of the Auxiliary Military Police. He is not yet a member. He signed that agreement and oath with the United States and that in turn is immediately forwarded to the Continuous Security District Office and then this pass is issued upon receipt after thorough checking has been given. It's issued on that contract. When you receive this pass then you know that you have been *accepted by the Government as one of their representatives in the plant.*" (Emphasis supplied.) (R. 70.)

He received a Certificate of Enrollment in the Auxiliary Military Police of the Army of the United States:

> "UNITED STATES OF AMERICA.
> Auxiliary Military Police.
> Army of the United States.
> Certificate of Enrollment.
>
> This is to Certify that Henry Adams Johnston has been voluntarily and duly enrolled as an Auxiliary to the Military Police with the rank of _____, for service with the Army of the United States at E. C. Atkins & Company, Indianapolis, Indiana, and is subject to Military Law for the duration of the War or until the earlier official termination by the War Department of his services as an Auxiliary to the Military Police.
>
> For the Commanding General, Fifth Service Command:
> Dated 29 June, 1943.
>
> A. C. RASMUSSEN,
> A. C. RASMUSSEN,
> *Lt. Col., Ord. Dept., Chief, Continuous Security District Office, Cincinnati, Ohio.*

Official:

B. R. WETENHALL,

B. R. WETENHALL,

Capt. C. M. P., District Plant Guard Officer, Cont. Secty. Dist. Off., Cincinnati, O."

(Resp. Ex. 6, R. 115-116)

4. The Chief Guards Received All Orders from the Army and None from Respondent.

Chief Johnston received *all* of his orders from the Army, and none of them from Respondent. He received three "general orders."

"Q. Now, how do you receive the general orders for your duties, from what source?

A. General orders are received from Capt. Wetenhall of the Fifth Service Command, Cincinnati."

• • • • •

"Q. I now show you Employer's Exhibits Nos. 10, 11, 12 and ask you what they are.

(Whereupon, the documents above referred to were marked for identification as 'Employer's Exhibits 10, 11, and 12.')

A. These are general orders from Capt. Wetenhall of the Fifth Service Command District Plant Guard Officer, who is over all the Auxiliary Military Police in this District. These three orders take up different subjects and they are to be followed." (R. 73.) He passed these orders on to this subordinates by having them photostated and enlarged four times. (R. 73.)

The Chief of Guards was instructed to enforce orders by the Army. He reported all violations of orders to the Army, and not to Respondent:

"Q. Referring to Employer's Exhibit No. 11, I call your attention to the third General Order 'to report all violations of orders I am instructed to enforce.'

A. That's right.

Q. To whom do you report such violations? What do you do under that order?

A. I would report any violation, any serious violation, to Capt. Wetenhall of Cincinnati." (R. 75.)

He took his orders from the Army and not from Respondent or Respondent's officials:

"Q. And who instructs you to enforce orders?

A. It would be the government.

Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?

A. Yes, naturally; I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.

Q. You try to cooperate?

A. I try to cooperate to the best of my ability and he does the same for me." (R. 75.)

* * * * * *

Johnston received all his instructions, and made all of his reports, orally and by correspondence with Captain Wetenhall and Lieutenant Scanlon of the Army. In addition to the testimony already quoted herein, there was further testimony by Johnston on that subject:

"Q. Do you have the right to recommend them for promotion or discharge? Do you do that?

A. I recommend a man for discharge but I don't discharge him myself.

Q. You have the right to recommend him for discharge?

A. Yes, sir.

Trial Examiner Shroyer: While on the subject, to whom do you recommend?

The Witness: To Capt. Wetenhall, Cincinnati, who does the discharging." (R. 81.)

"Q. In connection with your administrative duties, do you carry on any correspondence with Mr. Wood or any officials of the plant?

A. No, sir.

Q. Do you carry on any correspondence with the Cincinnati office of the Military?

A. Yes, sir.

Q. With Captain Wetenhall?

A. Wetenhall's office.

Q. Do you have before you there the file of that correspondence?

A. Yes, sir; I think it is here.

Q. And that file is about one inch thick now?

A. Yes, sir.

Q. And contains onion skin carbon copies of your letters to Wetenhall and original letters from Wetenhall to you?

A. That's right.

Q. About how often do you write him affecting your duties, responsibilities, and requests for instructions from him?

A. On an average probably of twice a week, is all.

Q. You ask him both for general orders and for specific instructions?

A. Yes; or I might on a small case instead of writing Capt. Wetenhall, I might talk it over with his assistant, Lt. Scanlon in the City of Indianapolis, who lives here.

Q. That wouldn't require correspondence?

A. No.

Q. You could conduct by telephone, too?

A. Yes.

Q. If a man is drunk on duty have you the right to discharge that man?

A. I couldn't discharge him legally; no, sir.

Q. Could you suspend him?

A. I would merely suspend him from duty as of the minute I saw him in that condition.

Q. What would be your next step?

A. To sit down and write Capt. Wetenhall a letter and I would recommend his discharge from the Military Police." (R. 83-84.)

5. Respondent Could Not Give Orders to the Chief Guards.

Chief Guard Johnston testified plainly that Respondent had no power to give him orders:

"Q. And who instructs you to enforce orders?

A. It would be the government.

Q. Do you take any orders from Mr. Wood who sits here in the court room and is the personnel director of E. C. Atkins and Company?

A. Yes, naturally; I work very closely with Mr. Wood, as he is personnel director of the plant and there can be much more efficient guarding of the plant and operation of the plant if we do work closely. I have never taken an order as such from him.

Q. You try to cooperate?

A. I try to cooperate to the best of my ability and he does the same for me." (R. 75.)

* * * * *

"Q. Do any of the Military Police under your command take any orders from any officer, director, or agent of the Atkins company as such?

A. No; they wouldn't take any orders. Just like myself, they would cooperate in any way they could, but they would only—

Q. Suppose such cooperation involved deviation from such specific order which you had to give. Would they follow your specific order or would they cooperate?

A. They would—that would be their orders—to follow mine; yes, sir." (R. 78.)

He repeated this under cross-examination:

"Q. Suppose Mr. Atkins came out and gave you an order. Would you obey that?

A. I never got an order.

Q. If you did, would you obey that order?

A. Well, I wouldn't consider it an order, in the first place. If I could oblige him in any way, without violating federal orders, I would do my best to cooperate with him, but I wouldn't have an order from him in the first place." (R. 82.)

This Court in its opinion states that Respondent gave no orders to the guards; and refers to the cooperation between Respondent and the Chief Guards as though it covered a relationship of control:

> "Respondent did not attempt to give orders to the guards, merely making suggestions to the chief guards. The latter worked in close cooperation with respondent's personnel manager and no friction developed."

This apparently refers to the testimony of Chief Johnston that he and Personnel Director Wood "work very closely" together and "cooperate." It is submitted that this is not an indication of control of the Chief Guard by Respondent. It is hoped that all war contractors "worked very closely" and "cooperated" with the Army. That raises no inference that the Army became an agent or subordinate of the war contractors.

Respondent's Personnel Director Wood denied any authority over the Chief Guards:

> "Q. Is his (Chief Johnston's) testimony with respect to your being permitted to make recommendations but not being permitted to give orders respecting the duties of the Auxiliary Military Police correct?
>
> A. It is correct.
>
> Q. You have been able to work in cooperation with the Auxiliary Military Police?
>
> A. We have; yes.
>
> Q. Have you ever attempted to exercise any of the authority which you are prohibited from exercising by military orders over any of these sixty-four members of the Military Police?
>
> A. Not to my knowledge.
>
> Q. Or has any foreman or hiring officer or director of Atkins and Company attempted to exercise such a right?
>
> A. No.
>
> Q. Instructions have been promulgated, have they not, throughout the entire plant that the Military Po-

lice are the business and affairs of the military authorities?

A. That's correct. It is understood, sir." (R. 89-90.)

* * * * * *

"Q. What would you do, Mr. Witness, if one of the Auxiliary Military Police came to your and protested to any action of a disciplinary nature by Chief Johnston?

A. Report that to the proper authorities, in this case to Col. Rasmussen in Cincinnati. He is the man that my office deals with when necessary.

Q. You would take no jurisdiction yourself?

A. No; not without instructions from Col. Rasmussen.

Q. You do, whenever matters of discipline are taken up in your plant get confirmation of any instructions which Col. Rasmussen or Capt. Wetenhall sent to Chief Johnston or to Chief Hann, is that right?

A. That's right." (R. 90.)

6. Respondent Did Not Delegate Any Power to the Chief Guards.

The Opinion of this Court contains the following statement concerning the origin of the Chief Guards' powers:

> "Respondent delegated to the chief guards its power to determine the guards' working hours and the promotion policies in regard to them."

As has been set forth in Part III (*supra*, p. 14) there is no evidence in the Record of the possession by Respondent of the power to fix promotion policies or hours of work. Likewise, there is no evidence of any kind of any act of delegation by Respondent to the Chief Guards of such powers. In view of the direct testimony that the Chief Guards took no orders from Respondent; and that they were completely controlled by the Army; it must be found that these powers came to the Chief Guards by delegation from the Army.

7. The Chief Guards Could Not Have Represented Respondent.

From the foregoing quotations from the Record, it is plain that Respondent did not intend to delegate any authority to the Chief Guards or to be represented by them. It is also plair that the Chief Guards thought that they represented the Army and that the Army did in fact give them orders and authority.

The Chief Guards could not be the agents and representatives of Respondent contrary to the intention and understanding of all concerned.

Conclusion.

It is submitted that rehearing should be granted and the decision of the Circuit Court of Appeals from the Seventh Circuit affirmed.

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CERTIFICATE OF COUNSEL.

The undersigned, FREDERIC D. ANDERSON, one of the attorneys for E. C. ATKINSON AND COMPANY, the Respondent in the above-entitled case, hereby certifies that the annexed "Petition for Rehearing of Respondent, E. C. Atkins and Company," is presented by him to the Supreme Court of the United States in good faith and not for delay.

Dated at Indianapolis, Indiana, this 11th day of June, 1947.

FREDERIC D. ANDERSON.

APPENDIX A.

PROVISIONS OF THE NATIONAL LABOR RELATIONS ACT PERTINENT TO THE PETITION FOR REHEARING OF THE RESPONDENT.

NOTE: Emphasis, **in bold face type**, is that of counsel.

RIGHTS OF EMPLOYEES.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS.

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right

to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES.

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention

that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) **The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board.** Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If **upon all the testimony taken** the Board shall be of the opinion that any person named in the complaint **has engaged in or is engaging in any such unfair labor practice, then** the Board shall state its findings of fact and shall issue and cause to be served on such person an **order** requiring such person to cease and desist **from such unfair labor practice,** and to take such affirmative action, including reinstatement of employees with or without back pay, as

will effectuate the policies of this Act. **Such order** may further require such person to make reports from time to time showing the extent to which it has complied with the order. If, **upon all the testimony taken**, the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, **then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.**

(d) **Until a transcript of the record in a case shall have been filed in a court**, as hereinafter provided, **the Board may** at any time, upon reasonable notice and in such manner as it shall deem proper, **modify or set aside, in whole or in part, any finding or order made or issued by it.**

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question **occurred** or wherein such person resides or transacts business, for the enforcement of **such order** and for appropriate temporary relief or restraining order, and shall certify and file in the court **a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board.** Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and **to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript** a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or

in part the order of the Board. **No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objections shall be excused because of extraordinary circumstances.** The findings of the Board as to the facts, **if supported by evidence**, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a **final order** of the Board granting or denying in whole or in part the relief sought may obtain a review of **such order** in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia,

by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court **a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board.** Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (c), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, **if supported by evidence,** shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C.; Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

APPENDIX B.

SUPREME COURT OF THE UNITED STATES.

No. 419.—OCTOBER TERM, 1946.

National Labor Relations Board, Petitioner, v. E. C. Atkins and Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 19, 1947.]

MR. JUSTICE MURPHY delivered the opinion of the Court.

The problem posed by this case is whether private plant guards, who are required to be civilian auxiliaries to the military police of the United States Army, are employees within the meaning of § 2 (3) of the National Labor Relations Act, 29 U. S. C. § 152 (3).

At all material times, the respondent corporation was engaged in the manufacture of saws, tools and armor plate. It employed more than 1,200 production and maintenance employees at its two plants at Indianapolis, Indiana. Before it began to produce armor plate for defense and war purposes, respondent employed about six watchmen or guards. When it entered upon war production, however, the War Department required that an auxiliary military police force of sixty-four members be established to guard the plants.

In 1943, after the necessary additional guards had been

recruited, a union[1] petitioned the National Labor Relations Board for investigation and certification of representatives pursuant to § 9 (c) of the Act. It was alleged that the union represented the sixty-four plant guards employed by respondent at its two plants. The respondent moved to dismiss the petition on the ground that it was not the employer of the guards within the meaning of § 2 (2) and that the guards were not employees as defined by § 2 (3). A hearing was thereupon held and evidence concerning the status of the guards was introduced.

On October 19, 1943, the Board concluded from the evidence thus submitted that these plant guards were employees within the meaning of § 2 (3) despite their status as civilian auxiliaries to the military police. 52 N. L. R. B. 1470. It held that all the plant guards at respondent's two plants, excluding the chief guards, lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constituted a unit appropriate for collective bargaining. An election was therefore directed to be held, which resulted in the union in question being chosen as bargaining representative. The union was certified by the Board as the exclusive representative of the plant guards.

Subsequently, the union filed charges that the respondent had refused to bargain collectively. A complaint was issued by the Board, followed by a hearing at which evidence regarding that refusal was introduced. The Board,

[1] Local 1683 of the International Association of Machinists, District 90. This union did not represent any of the maintenance or production employees in respondent's plants, but it did admit to membership plant protection employees of other employers as well as those of respondent.

on May 30, 1944, issued its decision in which it concluded that the guards were employees of respondent and that the latter had committed unfair labor practices in refusing to bargain with the union. 56 N. L. R. B. 1056.

The Board accordingly issued an order requiring respondent to cease and desist from refusing to bargain collectively with the union, and commanding it to bargain with the union, upon request, in respect to rates of pay, wages, hours of employment and other conditions of employment. The Seventh Circuit Court of Appeals declined to enforce the Board's order, holding (1) that the guards were not employees of the respondent within the meaning of § 2 (3) of the Act since they were militarized, and (2) that even if the militarized guards were to be considered as employees of respondent, enforcement of the Board's order should not be allowed because to do so would be or would likely be inimical to the public welfare. 147 F. 2d 730.

In filing a petition in this Court for a writ of certiorari, the Board noted that the guard forces at respondent's plants had been demilitarized early in 1944, but urged that the case was not thereby rendered moot. We granted certiorari, vacated the judgment below and remanded the case to the Circuit Court of Appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's order." 325 U. S. 838.

The Board and the respondent entered into a stipulation relative to the dates and circumstances of the demilitarization of the guards. The stipulation noted that most of the guards had been released from service and that only eleven of them had been retained as watchmen by respondent as of February 23, 1946; and those eleven had been

"sworn in as Deputy Policemen by the City of Indianapolis." The Board then filed a motion in the Circuit Court of Appeals for a decree enforcing its order. This motion was denied and the prior holding was reaffirmed, the court stating that the demilitarization was irrelevant to the issue of whether the plant guards were employees at the time when the respondent refused to bargain with the union. 155 F. 2d 567. The importance of the problem raised by the case, together with a conflict over the answer to this problem between the court below and the Sixth Circuit Court of Appeals, *Labor Board* v. *Jones & Laughlin Steel Corp.*, 146 F. 2d 718, prompted us to grant a further review of the case.

We agree with the Circuit Court of Appeals that the demilitarization of the guards did not render the case moot and that it had no effect upon the prime issue in the case. The Board's order was based upon a holding that the respondent committed an unfair labor practice by refusing to recognize and bargain with the union selected by the militarized guards. And that refusal occurred at a time when the guards were still militarized. A determination that the respondent had a statutory duty to bargain with the union at that time is therefore essential to the validity of the Board's order. The fact that the guards were subsequently demilitarized did not affect their status as employees at this crucial juncture; nor did it relieve respondent of any duty to bargain that it might otherwise have had at that point.

The Board's order, moreover, was a continuing direction to bargain collectively with the union designated by the guards. Demilitarization has not dispensed with whatever duty respondent may have now or in the future to comply with that order. If the guards were employees of respondent entitled to the benefits of the Act during the

period of militarization, *a fortiori* they are employees now that all connections with the Army have been severed; and their statutory rights continue to be entitled to full respect. Respondent's guard force still remains in existence, although considerably reduced in size, and the union presumably continues to be the representative of the guards. Under such circumstances, the case is not moot. *Labor Board* v. *Greyhound Lines*, 303 U. S. 261, 271; *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 334. See also *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, 260.

As to the merits, it is elementary that the Board has the duty of determining in the first instance who is an employee for purposes of the National Labor Relations Act and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law. *Labor Board* v. *Hearst Publications*, 322 U. S. 111. Realizing that labor disputes and industrial strife are not confined to those who fall within ordinary legal classifications, Congress has not attempted to spell out a detailed or rigid definition of an employee or of an employer. The relevant portion of § 2 (3) simply provides that "The term 'employee' shall include any employee, . . ." In contrast, § 2 (2) states that "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, . . ." As we recognized in the *Hearst* case, the terms "employee" and "employer" in this statute carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.

And so the Board, in performing its delegated function of defining and applying these terms, must bring to its

task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute. This does not mean that it should disregard the technical and traditional concepts of "employee" and "employer." But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations. And a determination by the Board based in whole or in part upon those considerations is entitled to great respect by a reviewing court, due to the Board's familiarity with the problems and its experience in the administration of the Act.

Laying aside for the moment the matter of militarization, we cannot say in this case that the Board would be legally unjustified in holding that the rank and file plant guards are employees within the meaning of the Act. They bear essentially the same relation to management as maintenance and production employees. In fact, they are indistinguishable from ordinary watchmen, gatemen, patrolmen, firemen and guards—persons who have universally been regarded and treated as employees for purposes of union membership and employee benefits. They perform such duties as inspecting persons, packages and vehicles, carrying cash to various parts of the plant, and generally surveying the premises to detect fires, suspicious circumstances and sabotage. Moreover, the guards in question are not supervisors; they possess no power to affect the working conditions of other employees. Without collective bargaining, they are subject to the unilateral determination by the employer of their wages, hours, seniority, tenure and other conditions of work. Individually, they suffer from inequality of bargaining power and their need for collective action parallels that of other employees. From any economic or statutory standpoint, the Board would be warranted in treating them as employees. Even under conventional standards, they are controlled by man-

agement to an extent sufficient to justify designating them as employees.

Nor can we say, as a matter of law, that permitting plant guards to be considered as employees entitled to the benefits of the Act would make them any less loyal to their employer in carrying out their designated tasks. In guarding the plant and personnel against physical danger, they represent the management's legitimate interest in plant protection. But that function is not necessarily inconsistent with organizing and bargaining with the employer on matters affecting their own wages, hours and working conditions. They do not lose the right to serve themselves in these respects merely because in other respects they represent a separate and independent interest of management. As in the case of foremen, we see no basis in the Act whatever for denying plant guards the benefits of the statute when they take collective action to protect their collective interests. *Packard Motor Car Co. v. Labor Board*, 330 U. S.—.

We cannot assume, moreover, that labor organizations will make demands upon plant guard members or extract concessions from employers so as to decrease the loyalty and efficiency of the guards in the performance of their obligations to the employers. There is always that possibility, but it does not qualify as a legal basis for taking away from the guards all their statutory rights. In other words, unionism and collective bargaining are capable of adjustments to accommodate the special functions of plant guards.

The crucial problem in this case, however, is whether the militarization of the plant guards changed their status as employees as a matter of law so as to prohibit the Board from extending to them the benefits of the Act which they would otherwise have. The short answer to that problem

is that militarization as such does not necessarily change the status of plant guards. It may or may not bring about a change, depending upon the particular circumstances. The militarization may be a qualified one; the employer may retain power to fix wages, hours and other conditions of work; the need and desirability for collective action on the part of the guards may exist as to the matters over which the employer retains control; and a recognition of the statutory rights of the guards may be entirely consistent with their military obligations. If that is the case, the guards remain employees for purposes of the Act. But if the militarization is such as to transfer to the Army all the matters over which the employer would normally have control, matters which would form the basis for collective bargaining as contemplated by the Act, the guards may lose their status as private employees within the purview of the statute.

The Board's determination that the militarization of the guards in respondent's plants was of a type that did not alter their status as employees under the Act must therefore be tested by the applicable War Department regulations and by the evidence introduced at the hearing before the Board. If such a result is consistent with the regulations and has a reasonable basis in the other evidence, the Board's order must be sustained.

The plant guards in this case were enrolled as civilian auxiliaries to the military police under War Department regulations issued pursuant to Executive Order No. 8972, dated December 12, 1941. That order authorized the Secretary of War to establish and maintain military guards and patrols, and to take other appropriate measures, to protect certain strategic premises, materials and utilities from injury and destruction. The Secretary of War accordingly directed the military organization of plant guard forces as auxiliary military police at plants important to

the prosecution of the war, the directive to that effect being issued by the Adjutant General on July 2, 1942. Supplementary regulations were contained in Circular No. 15, issued on March 17, 1943, by Headquarters, Army Service Forces.[2]

As stated by these regulations, the purpose of the military organization of the plant guards was "to increase the authority, efficiency, and responsibility of guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations."[3] It was made clear, however, that plant managements were not relieved of their responsibility "for providing adequate protection at all times against all hazards."[4] In other words, employers who wished to obtain government contracts for the production of war materials were required to provide "adequate protection" for their plants where the material was to be produced; if the existing plant protection forces were inadequate, additional guards were to be recruited by the employers. But all the original and additional guards were to be enrolled as civilian auxiliaries to the military police.

The military authorities reserved the right to veto the hiring or firing of any plant guard where such action by the employer might impair the efficiency of the guard force.[5] And the military plant guard officers were authorized to take appropriate action "through the plant

[2] Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co. v. Johnson*, 316 U. S. 481, 483-484.

[3] Circular No. 15, par. 1a.

[4] *Id.* par. 1b.

[5] *Id.* par. 6b (2).

management" to correct conditions which might result in "defective or inadequate performance by the guard forces of its ordinary protective duties."[6]

The functions of these civilian auxiliaries to the military police were stated to be twofold: "(1) To provide internal and external protection of the plant against sabotage, espionage, and natural hazards. (2) To serve with the Army in providing protection to the plant and its environs in emergency situations."[7] They were subject to call for military service even where emergencies arose at places other than the plants where they normally worked. To these ends, military plant guard officers were authorized to exercise direct control over the guard forces "only in matters relating to military instruction and duties as Auxiliary Military Police."[8] But such orders "will be issued only after consultation with and, if possible, concurrence by the plant management. * * * Control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations. Although the plant guard officers will be in command at all times, *they will not supplant the civilian guard officers*, and unless expediency demands otherwise will exercise their authority through the chain of command established by the plant management."[9] The regulations also provided that the military drill of the guard forces should not exceed one hour per week "except with the approval of the plant management."[10]

As to the employer's relations with the guard force, the regulations were explicit in recognizing that those relations remained essentially the same as if there were no

[6] *Id.* par. 1b.
[7] *Id.* par. 2a.
[8] *Id.* par. 5a (2).
[9] *Id.* pars. 5c (2) and 6a (1).
[10] *Id.* par. 7g (1).

militarization. According to Circular No. 15: "Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements. Guards in the employ of a private employer may, as heretofore, be dismissed by that employer."[11] A veto power over employment and dismissal, of course, was retained by the military. It was further provided: "The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employer's liability provisions remain unaffected."[12] And the employer was expected to train the guard forces in their ordinary protective duties and was required to furnish them with uniforms and weapons.[13]

The right of the plant guards to bargain collectively was recognized by Circular No. 15, paragraph 6h (2) of which provided: "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see *In re Lord Mfg. Co. & United Rubber Workers of America*, CIO, Case No. R—4826, February 1943) [*Lord Manufacturing Co.*, 47 N. L. R. B. 1032], the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now

[11] *Id.* par. 6b (1).

[12] *Id.* par. 6f.

[13] The guards were required to salute Army officers and had the right to arrest anyone in the plants. They carried identification cards issued by the War Department and wore arm bands on which appeared the words "Auxiliary Military Police." *Id.* par. 7.

included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious consideration will be given to effect a change to conform to the foregoing policies."[13] Provision was also made that collective bargaining agreements covering plant guards who were civilian auxiliaries should include a clause recognizing that nothing in the collective bargaining relationship should interfere with the duties imposed upon the guards as auxiliary military police.[14]

The guards were required to sign agreements with the United States.[15] Each agreement stated that the individual, who had been or was about to be employed by the particular company as a guard at its plant, agreed that he would support and defend the Constitution, bear true faith and allegiance to the Constitution, and faithfully discharge his duties as a civilian auxiliary to the military police. He also acknowledged in this agreement that appropriate Articles of War had been read and explained to him and that he was subject to military law during his employment. The applicable regulations then provided that he could be court martialed where no other effective form of punishment would be effective. But "Unlike the court-martial punishment of a person in military service, a court martial cannot punish a member of the Auxiliary Military Police by reduction in military grade or by forfeiture of pay and allowances. Analogous punishments might be imposed, such as reduction in grade in the guard organization or temporary suspension from duty. A fine, as distinguished from forfeiture, is regarded as an appropriate form of punishment."[16] In all other respects, the guards remained subject to the civil courts.

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[13] *Id.* par. 6h (1).

[14] *Id.* par. 6h (1).

[15] If a guard refused to sign this agreement, he might be, but need not be, temporarily retained with the understanding that he would be dismissed as soon as he could be replaced, and in any event within a reasonable time. *Id.* par. 5b (1).

[16] *Id.* par. 8d.

The evidence and testimony submitted to the Board confirmed the fact that the plant guards in respondent's two plants were militarized in accordance with the foregoing regulations. The guards at each plant were under the direct supervision of a chief guard and several lieutenants—all of whom were civilians recruited by the respondent like the rank and file guards. The military superior of the chief guards was the District Plant Guard Officer stationed at the Continuous Security District Office of the War Department, Cincinnati, Ohio, an officer who also had charge of guard forces at other plants in the district. A general directive issued by this office repeated many of the provisions of Circular No. 15.[17] It also provided that orders and regulations for the auxiliary military police would be issued in the name of the Chief of the District "after plant management has indicated its concurrence by signing the guard order in the lower left hand corner." But the only guard orders received by the chief guards at respondent's plants were three general ones signed by the District Plant Guard Officer, orders that were applicable to all militarized guards in the district. All the specific orders that were ever issued emanated from the chief guards. About the only direct contact between the military authorities and these guards occurred during the weekly drill period.

Respondent recruited the necessary additional guards through its ordinary employment channels and it had the power to initiate dismissals from the force. Such actions, however, were subject to the approval of the military. Respondent at all times carried the guards on its regular pay rolls, determined their rate of compensation and paid their wages after making appropriate deductions. And since it did not operate on a cost-plus basis, respondent

[17] This directive, however, omitted par. 6h (2) of Circular No. 15, dealing with the right of guards to bargain collectively.

actually bore the cost of the guards' wages.[18] Respondent did not attempt to give orders to the guards, merely making suggestions to the chief guards. The latter worked in close cooperation with respondent's personnel manager and no friction developed. Respondent delegated to the chief guards its power to determine the guards' working hours and the promotion policies in regard to them. Finally, respondent maintained its liability as to the guards on matters of social security and workmen's compensation and was obliged to obey all minimum wage and maximum hour requirements.

From the foregoing, an ample basis is evident to support the Board's determination that militarization did not destroy the employee status of the guards in respondent's plants. The War Department regulations and the actual practice in these plants were based upon the explicit assumption that the guards were the private employees of respondent rather than employees or soldiers of the United States. The regulations made it unmistakable that the normal, private employer-employee relationship was to remain substantially intact. Especially clear was the fact that the right of the guards to join unions and to bargain collectively was to be respected. The military authorities took over from respondent only those attributes of control which were necessary to effectuate the rather limited military program, many aspects of that transferred power

[18] Respondent argues that it was forced to pay the guards because of the War Department's action in requiring additional plant protection. But respondent was not forced to enter into its war production contracts with the Government. It did so voluntarily and with the understanding that it would comply with any terms and conditions the Government saw fit to impose. One of these conditions was that respondent expand its peacetime guard force of six men to a wartime complement of sixty-four. So far as these additional guards being respondent's employees is concerned, it is no different from a requirement that respondent employ more chemists or other production experts to facilitate execution of the contracts.

being exercisable by the Army only in the gravest emergencies.

We cannot say that the Board was without warrant in law or in fact in concluding that respondent retained "a sufficient residual measure of control over the terms and conditions of employment of the guards" so that they might fairly be described as employees of respondent.[19] The most important incidents of the employer-employees relationship—wages, hours and promotion—remained matters to be determined by respondent rather than by the Army. Respondent could settle those vital matters unilaterally or by agreement with the guards. And the guards were free to negotiate and bargain individually or collectively on these items. It is precisely such a situation to which the National Labor Relations Act is applicable. It is a situation where collective bargaining may be appropriate and where statutory objectives may be achieved despite the limitations imposed by militarization. Under such circumstances, the Board may properly find that an employee status exists for purposes of the Act.

In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the

[19] The Board's conclusion in this respect is confirmed by the results reached under other statutes. Militarized guards have been treated as private employees for purposes of the Fair Labor Standards Act. *Walling* v. *Lum*, 7 Wage Hour Rep. 570. And they have consistently been treated as such by the National War Labor Board. *Detroit Steel Products Co.*, 6 War Lab. Rep. 495; *Brewster Aeronautical Corp.*, 11 War Lab. Rep. 286, 15 War Lab. Rep. 239, 240-243; *Great American Industries*, 11 War Lab. Rep. 287; *Youngstown Sheet & Tube Co.*, 15 War Lab. Rep. 500, 19 War Lab. Rep. 813; *General Motors Corp.*, 18 War Lab. Rep. 541. And see *Labor Board* v. *Carroll*, 120 F. 2d 457.

existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present. *Labor Board* v. *Hearst Publications, supra,* 129.

The Board's determination that there was a relationship in this case deserving of statutory protection does not reflect an isolated or careless reconciliation of the rights guaranteed by the Act with the important wartime duties of plant protection employees. In the course of its administration of the Act during the war, the Board was faced with this problem many times.[20] It was well acquainted with the important and complex considerations inherent in the situation. The responsibility of representing the public interest in such matters and of reaching a judgment after giving due weight to all the relevant factors lay primarily with the Board. See *Southern Steamship Co.* v. *Labor Board,* 316 U. S. 31, 47. In the absence of some compelling evidence that the Board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the Board and to substitute their own ideas of the public interest. We find no such evidence in this case.

Here we have the Board's considered and consistent

[20] See, *e. g., Chrysler Corporation,* 44 N. L. R. B. 881; *Budd Wheel Co.,* 52 N. L. R. B. 666; *Dravo Corporation,* 52 N. L. R. B. 322. See also National Labor Relations Board, Seventh Annual Report (1943), p. 63; Eighth Annual Report (1944), p. 57.

judgment that militarized plant guards may safely be permitted to join unions and bargain collectively and that their military duties and obligations do not suffer thereby. In agreement with that viewpoint has been the War Department, the agency most directly concerned with the military aspects of the problem. Its regulations and directives have clearly acknowledged the feasibility of recognizing collective bargaining rights of these guards during wartime, provided only that no encroachment is made upon military necessities. This policy of the Board, moreover, has been confirmed by experience. The Board states that it has certified bargaining representatives for units of militarized guards in more than 105 cases, in none of which has any danger to the public interest or to the war effort resulted.

Under such circumstances, it would be folly on our part to disregard or to upset the policy the Board has applied in this case.[21] Since the Board's order is in accord with the law and has substantial roots in the evidence, it should have been enforced by the Circuit Court of Appeals. Respondent's objections to the language and scope of the order are either without merit or have been removed by the demilitarization of the guards. And any issues concerning the subsequent deputization of the guards as policemen are answered by our decision in *Labor Board* v. *Jones & Laughlin Steel Corp.*, *post*, p. . The judgment below is accordingly

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON dissent substantially for the reasons set forth in the opinion of the court below, 155 F. 2d 567.

[21] In adopting the War Labor Disputes Act, 57 Stat. 163, Congress provided in § 7 (a) (2) that all actions of the National War Labor Board must conform to the provisions of the National Labor Relations Act—an indication that Congress deemed the preservation of the right to collective bargaining to be essential in war industries.